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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1094

CORRAL SPORTSWEAR COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. -----

CORRAL SPORTSWEAR COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

Corral Sportswear Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on October 4, 1967, in No. 9185, *National Labor Relations Board v. Corral Sportswear Company*, 383 F 2d 961 (Appendix A, infra page A-1).

Opinions Below

The decision and certification of the Board in the representation proceeding is unreported and is printed as Appendix D hereto, infra page A-13. The Board's decision and order based thereon requiring petitioner to bargain with the charging union printed as Appendix F hereto, infra page A-17, is reported in 156 N.L.R.B. 436. The opinion of the Court of Appeals printed as Appendix A hereto, infra pages A-1 - A-9, is reported in 383 F2d 961.

Jurisdiction

The judgment of the Court of Appeals enforcing the Board's order was entered on October 4, 1967, Appendix B hereto, infra page A-10. Rehearing was denied on November 15, 1967, Appendix C hereto, infra page A-12. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Whether an order of the Board requiring the employer to bargain collectively is valid and enforcible when based upon a representation election in which employees in a class thereafter determined and held to be supervisors cast ballots counted as valid in sufficient number to be determinative of the results of such election.

Statute Involved

The statutory provisions involved are sections of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq., i.e., Sec. 2(3) (11), Sec. 7, Sec. 8(a)(5), Sec. 9(a)(d), Sec. 10(a) (b)(c)(e). The pertinent parts of these sections are printed in Appendix G, infra pages A-30 - A-34.

Statement

The union[1] petitioned the Board for certification as the bargaining representative of the production and maintenance employees at the company's Ardmore, Oklahoma garment factory. The company and union

[1]Local 670, International Union of Operating Engineers.

entered into a Stipulation for Certification Upon Consent Election which was approved by the Board and pursuant to which an election was held.

No determination was made by the Board or by agreement of the company and union prior to the election concerning the specific employees or classifications of employees included in the voting unit.

There was a classification composed of six employees known and designated as linegirls. Their authority, duties and responsibilities were identical. These six linegirls were included by the company on the list of eligible voters furnished the Board for use in the conduct of the election (Appendix A, infra page A-5). At the conference immediately preceding the election the union took the position that *all* employees of that class should be included or excluded (Appendix A, infra pages A-6 - A-7). The company adhered to its view that the linegirls were non-supervisory and eligible to vote.

At the election the union challenged *two* linegirls as supervisors and their ballots were impounded. The remaining *four* linegirls voted and their ballots were counted. Consistent with its position that all linegirls were not supervisors the company did not challenge their ballots. Other challenges were made that are not pertinent here.

The tally of the ballots showed 36 had been cast for the union and 35 against. This made it necessary to pass on the challenges because they were sufficient in number to be determinative of the results of the election.

The Board held that the linegirls whose ballots were challenged were supervisors, and as such they were not employees under the Act and hence were not eligible to vote. The ballots cast by the four linegirls were allowed to stand as valid votes notwithstanding they were sufficient in number to be decisive of the election, and the Board certified the union as the duly designated bargaining representative of the employees (Appendix D, infra pages A-13 - A-16).

The company declined to recognize and bargain with the union in order to obtain a review of the representation proceeding.

The Board, relying upon the election and certification, found the company guilty of refusal to bargain in violation of the Act and ordered it to bargain (Appendix F, pages A-17 - A-29).

The United States Court of Appeals for the Tenth Circuit handed down its opinion and entered its decree on October 4, 1967, enforcing the Board's order (Appendix A and B, infra pages A-1 - A-11). The company's petition for rehearing was denied November 15, 1967 (Appendix C, infra, page A-12).

Reasons for Granting the Writ

This is not the mill run substantial evidence type of Labor Board case. Presented here are questions of recurring and prime importance in the administration of the basic collective bargaining provisions of the National Labor Relations Act. The Board and Court of Appeals misconceived, misapplied, and invoked a

completely unwarranted and insupportable extension of the Court's holding in *N.L.R.B. v. A. J. Tower*, 329 US 324, 67 Sup. Ct. 324, 91 Led 322 which requires review and correction by this Court. In sustaining the Board's order the Court of Appeals ennunciated and relied upon a completely novel procedural requirement in representation proceedings which is at odds with the Act, and which if allowed to stand will confuse and impede the administrative process and frustrate the purposes and policies of the Act.

1. The exclusion of some and the inclusion of other members of an identical class of supervisors in the selection of a bargaining representative is patently indefensible and in direct contravention of the Act. When the number of supervisors voting is sufficient to be decisive in such selection the numerical results thereof cannot be said to represent the wishes of the majority of the employees under the Act, and a valid certification or order requiring the employer to bargain cannot be predicated thereon.

It is elemental that the obligation to bargain collectively arises only when a majority of the *employees* in an appropriate unit so elect and that supervisors are not employees for such purposes by express statutory exclusion.

No authority, justification or excuse exists for basing a bargaining order on votes cast by supervisors.

The far reaching importance of the principle involved requires and deserves vindication at the hands of this Court. Otherwise respect for the rule of law

expressed in the statute will be lost to administrative fiat. Votes of supervisors invalid as a matter of law do not and cannot become valid for purposes of the Act because of any procedural act or omission or otherwise.

2. In declining to recognize the invalidity of the votes cast by the four supervisory linegirls and the consequent fatal absence of evidence of the wishes of a majority of the *employees* in the election, the Board and the Court below relied upon this Court's opinion in *N.L.R.B. v. A. J. Tower*, 329 U.S. 324, 67 Sup. Ct. 324, 91 Led 322.

Apparently unconcerned with the undisputed fact that the position of the six linegirls was identical and with its determination as to two of them that as supervisors they were not eligible to vote, the Board gave validity to the decisive votes of four of them assertedly because of its policy not to entertain post-election challenges which it said had been approved by this Court in the *Tower* case (Appendix F, page A-23).

The *Tower* case is not authority for the mechanical or automatic application of the Board's policy in all cases and particularly not in the instant case. The fact situation in *Tower* was vastly different from that here involved. In sustaining the policy as applied to the facts of the *Tower* case this Court said,

> "When it is applied properly, it cannot deprive the Board of jurisdiction to find an unlawful failure to bargain collectively. That is true even where it subsequently is ascertainable that some of the votes cast were in fact ineligible and that

the results of the election might have been different *had the truth previously been known*" (at page 333, emphasis supplied).

"And an exception to the rule is recognized where the Board's agents or the parties benefiting from the Board's refusal to entertain the issue know of the voter's ineligibility and suppress the facts. (Re Hale, 62 NLRB 1393; Re Beggs & Cobb, Inc. 62 NLRB 193) The Board thus appears to apply the prohibition fairly and equitably in light of the realities involved" (at page 333).

In the instant case there was no question prior to the election that *all* linegirls were either eligible or not eligible to vote as a class. The point was made at the pre-election conference and was known to the Board agent who conducted the election. The eligibility list contained the names of all six linegirls, each with the identical designation "linegirl." It was no mere matter of chance that two of them were challenged and four were not. It was designed to produce the very result that ensued, and the Board's agent wittingly or unwittingly became a party to the union's strategy. The Board held that the challenges were good as to the two and that the ballots of the other four supervisors were valid in establishing the majority status of the union.

This situation is completely at odds with the rationale of the Board's rule in respect to post-election challenges and with this Court's approval of it. Here the union clearly benefitted from the Board's refusal to entertain the issue within the exception to the rule re-

ferred to by the Court. It cannot be said here that the Board's policy was "applied properly" or "fairly or equitably in light of the realities involved." Approval of the certification and enforcement of the order to bargain requires that "the realities involved" be ignored and that the provisions of the Act in respect to supervisors and majority rule be set at naught solely and simply because the ballots of the four supervisors were not challenged at the time of the election. The absence of challenges could not and did not render valid the void ballots of supervisors. The statutory duty and responsibility of the Board in administering the Act should not be allowed to be subverted or abdicated in favor of rigid and slavish adherence to a procedural rule which in the undisputed circumstances of the instant case ignores the realities involved, directly contravenes cardinal provisions of the Act and aborts its high purposes.

3. Unable to find adequate support elsewhere for the Board's refusal to consider the undeniable fact that ballots cast by supervisors rendered inconclusive the results of the election, the Court below invoked and applied a rule hitherto unknown in representation proceedings under the Act.

Under this rule, borrowed from "Civil Procedure," the Court of Appeals held that the only protection against the results experienced here lay in "the strategy of challenge" in which the company was required to challenge the right to vote, in the alternative, of persons whom it believed and contended were eligible to vote.

The Court pointed out that under the rules of "Civil Procedure" a litigant has the right to protect its position by taking inconsistent positions in the alternative. This rule was held applicable to a representation proceeding under the Act, and the questions concerning the invalidity of the supervisor's ballots were foreclosed under the Board's policy precluding post election challenges because of the company's failure to avail itself of such rule.

This holding completely misconceives the nature of a representation proceeding and has no reasonable or proper application to it. The holding also assumes, erroneously, that in such proceedings the employer can challange would-be voters as a matter of right, in the alternative or otherwise.

There is and can be no question that a representation proceeding under the Act is investigatory and non-adversary in character. Rules of civil procedure in adversary proceedings including the one invoked by the Court below do not embrace or govern such a purely administrative proceeding.

Consistent with the investigatory nature of the proceeding the right to challenge upon which the Court below relied is non-existent.

If the opinion of the Court below is allowed to stand the strategy of challenge in a representation proceeding that it ennunciates will make a shambles of such proceedings in countless cases and will invite and lead to protracted legalistic jousting that will impede and impair vital processes of the Board and frustrate the purposes and policies of the Act.

Conclusion

Based on the foregoing reasons, writ of certiorari should be granted.

Respectfully submitted,

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Fort Worth, Texos 76102

February 6, 1968.

APPENDIX A

Opinion of Court of Appeals Enforcing The Board's Order

FILED
United States Court of Appeals
Tenth Circuit
October 4, 1967
WILLIAM L. WHITTAKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

September Term, 1967

No. 9185

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CORRAL SPORTSWEAR COMPANY, *Respondent.*

On Petition for Enforcement of An Order of the National Labor Relations Board

---

Thomas R. Beech (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, George B. Driesen, Attorney, National Labor Relations Board, were with him on the brief) for Petitioner.

Karl H. Mueller (Harold E. Mueller of Mueller & Mueller was with him on the brief) for Respondent.

Before LEWIS and SETH, Circuit Judges, and BRATTON, District Judge.

LEWIS, Circuit Judge.

The National Labor Relations Board seeks enforcement of its order requiring the respondent Company to bargain with the Union[1] earlier certified by the Board as the collective bargaining agent of the Company. The Company's refusal to bargain after certification is admitted and constitutes a violation of section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158, unless, as the Company here contends, the Board's certification was premised upon an invalid election.

The Corral Sportswear Company is engaged in the manufacture of coats and jackets with a plant located at Ardmore, Oklahoma. In August of 1964, the Union filed a petition for an election among the Company's employees. Thereafter, the Union and Company entered into a stipulation for Certification Upon Consent Election, which was approved. At the time of the election in question, the Company had 96 employees, of whom 76 were allowed to vote. In October of 1964, the Board conducted an election at which 71 unchallenged ballots were cast, 36 for the Union, and 35 against. During the voting, the Company challenged the ballot of a set-up department employee, and the Union challenged the ballots of two linegirls, a finishing department employee, and the patternmaker. Since

[1]Local 670, International Union of Operating Engineers, AFL-CIO.

the 5 challenged ballots were sufficient in number to affect the result of the election, an investigation was conducted pursuant to section 102.69 of the Board's Rules and Regulations.[2]

Upon recommendation of the Regional Director, the Board ordered a hearing to resolve the challenges. The Hearing Examiner, after hearing the evidence, sustained all 5 challenges. The Company's challenge, and 3 of the 4 Union challenges were sustained on the grounds that the employees in question were "supervisors" within the meaning of the Act.[3] Under the Act, supervisors are not within the shelter of the organizational provisions to bargain collectively. NLRB v. Edward G. Budd Mfg. Co., 6 Cir., 169 F2 571, *cert. denied*, Foreman's Ass'n of America v. Edward G. Budd Mfg. Co., 335 U.S. 908 (1949). The remaining employee challenged by the Union was the wife of the plant superintendent who did all her work at home rather than at the plant and was found by the Hearing Examiner to lack sufficient community of interest with the other employees in the plant to warrant her inclusion in the bargaining unit.

Based on the one vote majority, the Board certified

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[2]29 C.F.R. Sec. 102.69(c) provides that ". . . if the challenges are sufficient in number to affect the results of the election, the Regional Director shall investigate such objections or challenges or both . . . ."

[3]Supervisory personnel are distinguished from employees in 29 U.S.C. § 152(11) which provides: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

the Union and denied the Company's petition for reconsideration.

The Company first resists enforcement of the Board order through claim of error in the determination that the Union's challenges were valid as leveled against supervisory employees.[4] Although judicial review of this supporting finding by the Board is proper, Universal Camera Corp. v. NLRB, 340 U.S. 474, we must recognize ". . . that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor.'" NLRB v. Swift & Co., 1 Cir., 292 F2 561, 563. So viewed we find ample support in the record sustaining the Board's action in refusing to count the votes of those employees challenged by the Union as supervisors.

It is well settled that section 2(11), cited in full in footnote #3, *supra*, is to be read in the disjunctive and the existence of any one of the indicia listed is sufficient to support a finding that the one possessing it is a supervisor. *E.g.*, Warner Company v. NLRB, 3 Cir., 365 F2 435, NLRB v. Edward G. Budd Mfg. Co., *supra;* NLRB v. Elliott-Williams Co., 7 Cir., 345 F2 460. The record shows that the employees in question performed one or more of the tasks which qualify them for supervisor status. They did on occasion exercise authority which was more than of a merely routine or clerical nature and required the use of in-

[4]The Company makes no argument against the validity of the challenge of the patternmaker.

dependent judgment. The functions of the challenged employees in question were almost identical to those of certain "floorladies" in the recent case of Brewton Fashions, Inc. v. NLRB, 361 F2 8, *cert. denied*, 385 U.S. 842 (1966), where the Board's determination that said floorladies were supervisors was upheld by the Fifth Circuit.[5] We hold the Board's findings that the challenged votes were those of supervisory employees are supported by substantial evidence.

The Company also contends that the election was invalid because, after two of the Union's challenges were allowed, four other unchallenged votes became invalid as a matter of law and consequently the result of the election does not necessarily reflect the will of the employees eligible to vote. This question has some aspects of first impression and requires more particularized consideration.

Prior to the election the Company prepared and submitted a list of its employees which, after the parties had stipulated as to the ineligibility of certain employees to vote because of their supervisory duties, contained a total of 76 voters—1 janitor, 1 patternmaker, 11 cutters, 3 set-up department employees, 3 finishing department employees, 2 shipping department employees, 6 linegirls, and 49 employees performing other work. All voted, as earlier indicated, with 5 challenges made. The Company challenged Pat Wilson, a set-up department employee, as a super-

[5]Note also from Labor Law Report #86 for July 21, 1967 . . . "Floorladies who were responsible for teaching and assigning work to 18 other employees were supervisors." Sagamore Shirt Co., dba Spruce Pine Mfg. Co., 1967 CCH NLRB ¶ 21,653.

visor; the Union challenged Velma Trent, a finishing department employee, as a supervisor; the Union challenged Myrtha Heartsill and Gladys Roberts,[6] linegirls, as supervisors; and the Union challenged Ruth Wills, the patternmaker.

At a pre-election conference the Union and the Company apparently made an effort to set the ground rules for the determination of eligibility of voters. Our present record abstracts testimony of an occurrence at the conference through the examination by Union counsel of Mr. Simpler, the Company plant manager:

> Q. Could it be, Mr. Simpler, that the reason you challenged Pat Wilson or had her challenged at the polls was because you knew she was a strong union sympathizer? A. I definitely—no, sir, that is not true, positively not true, because I did not know that she was a strong sympathizer at that time.
>
> Q. Did you hear any of this testimony here today? A. Yes, sir.
>
> Q. That was the only one that you objected to on the list at the pre-election conference? A. Yes, sir.
>
> Q. Do you recall my taking the position that if she was a supervisor that others were supervisors and that I was either willing to let them all vote or none of them vote? A. I remember that Mr. Brazel, but you did not know the circumstances at our plant at that time.

[6]Roberts was made a temporary lead linegirl shortly before the election, and, although former lead linegirls had been stipulated to be supervisors, this incident is not considered to be of determinative significance.

Q. What was your position on it? A. My position was that that was the only supervisor that we had in the plant.

Q. Did you refuse to let all of these people vote or let none of them vote; what was your action to my suggestion? A. I think that my action was that the supervisors should not vote and those that are not supervisors are eligible to vote.

Springing from this procedural background the Company now contends that if, as the Board found, the two linegirls Heartsill and Roberts were supervisors then the other four unchallenged linegirls were also supervisors and ineligible to vote. Under these circumstances, so says the Company that once the ". . . Board agent permitted and accepted the challenges as to two members of the class, he was under a positive duty to protect the integrity of the election by challenging or impounding the ballots of the other members of the class until the eligibility of all had been determined."

Although the Company's contention certainly has initial appeal[7] because of the probability that ineligible votes were cast in the subject election we do not find ultimate legal merit to its argument. We learn from NLRB v. A. J. Tower Co., 329 U.S. 324, that even the *fact* of the ineligible votes determinative of results in an election does not invalidate an election and that the Board need not entertain post-election challenges

[7]However we cannot accept the Company's conclusion that the testimony of Simpler projects unequivocal knowledge to the Board that an "all or none" eligibility issue existed among groups of the employees. The testimony of the post-election conferences cited, if anything, tends to negative that the Company advanced any such contention at that time.

as a requirement to further the purposes of the Act. This rule is contained in Board Regulation, section 102.69(a). An exception to the general rule of *Tower* exists when the fact of ineligibility is known to the Board's agent or the parties benefiting from such knowledge and the facts are suppressed. The exception is noted by the high court in view of the Board's earlier rulings in the Matter of Beggs & Cobb, Inc., 62 N.L.R.B. 193 and Matter of Hale, 62 N.L.R.B. 1393. In these instances the Board's agent and the Union knew the critical facts but the employer did not. Such is not this case for there is no claim of suppression and no claim that the employer was unapprised of the critical facts.

It is of course true that the Board's agent was aware of an existent dispute between the Company and the Union as to which employees were supervisors and which were not. This dispute was not limited to the list furnished by the Company under the classification of linegirls and no clear answer to the dispute was dictated by the presentation of the parties. The procedural method to be invoked by the Board to settle a dispute involving supervisory status is a matter falling within the field of administrative expertise and will not be disturbed by this court absent a clear abuse of discretion. In the case at bar all parties had equal knowledge of the issues and it was neither improper nor unusual for the Board to resort to the challenge procedures as a method of resolution. *Cf.* Angle v. Martin Sacks, Regional Director, 10 Cir., ... F2 ....., decided August 28, 1967. The general duty of the Board to supervise the integrity of elections does

not extend to the duty to police the strategy of challenge[8] to the point of perfection in this aspect of the democratic process. The practicalities of administration and the desirability of finality in election results, as indicated in *Tower*, negative an absolute duty of the Board to entertain post-election challenges even though the possibility exists that ineligible ballots were counted.

The order will be enforced.

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[8]The Company contends that consistency prevented it from challenging those linegirls not challenged by the Union. We find no merit to this argument. Civil procedure recognizes the advancement of inconsistent positions as alternatives dependent upon a fact finding and the Company would in no way be prejudiced by contending the linegirls were not supervisors and at the same time lodging challenges as an alternative means of protecting against what it now deems to be an unlawful result.

APPENDIX B

Decree of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 9185

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CORRAL SPORTSWEAR COMPANY, *Respondent.*

DECREE

Before: Lewis and Seth, Circuit Judges, and Bratton, District Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, on December 29, 1965. The Court heard argument of respective counsel on July 10, 1967, and has considered the briefs and transcript of record filed in this cause. On October 4, 1967, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Tenth Circuit, that the said order of the National Labor Relations Board in said proceeding be enforced, and that Corral Sportswear Company, its officers, agents, successors, and assigns abide by

and perform the directions of the Board in said order contained.

/s/ .....

Judge, United States Court of Appeals for the Tenth Circuit

DATED: October 4, 1967

APPENDIX C

Order of Court of Appeals Denying Rehearing

Third Day, November Term, Wednesday,
November 15th, 1967.

Before Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges, and Honorable Howard C. Bratton, District Judge.

9185

National Labor Relations Board, *Petitioner*,

vs.

Corral Sportswear Company, *Respondent*.

On Petition for Enforcement of an Order of the National Labor Relations Board.

This cause came on to be heard on the petition of respondent for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

APPENDIX D

Board's Decision and Certification

Ardmore, Oklahoma

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 16-RC-3745

CORRAL SPORTSWEAR COMPANY, *Employer*
and
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 670, AFL-CIO, *Petitioner*

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a stipulation for certification upon consent election approved by the Regional Director for the Sixteenth Region, an election by secret ballot was conducted on October 2, 1964, among the employees in the stipulated unit. At the conclusion of the balloting, a tally of ballots was served on the parties. The tally showed that of approximately 76 eligible voters, 36 cast ballots for, and 35 against the Petitioner. Five ballots were challenged. The challenged ballots are sufficient in number to affect the results of the election. No objections to conduct affecting the results of the election were filed within the time provided therefor.

In accordance with the Board's Rules and Regula-

tions, the Regional Director investigated the challenges and in his report dated November 27, 1964, recommended that a hearing be held to resolve the challenges. The Board adopted the recommendation of the Regional Director and ordered a hearing on December 14, 1964. A hearing was held and on February 17, 1965, Charles H. Steere, Hearing Officer, issued his report on challenged ballots in which he recommended that the challenges to all of the challenged ballots be sustained and that the Petitioner be certified as the exclusive bargaining representative of the employees in the stipulated unit. The Employer filed timely exceptions to these recommendations.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act:

[1]The Hearing Officer recommended that the challenge to the ballot of Pat Wilson be sustained. In the absence of exceptions we adopt *pro forma* the Hearing Officer's recommendation.

4. We find, in accord with the stipulation of the parties, that the following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed at the Employer's Ardmore, Oklahoma, plant, excluding office clerical employees, truckdrivers, guards, watchmen, and supervisors as defined in the Act.

5. As the Employer's exceptions, in our opinion, raise no substantial or material issues with respect to the Regional Director's findings and recommendations concerning the objections, we shall adopt them and overrule the objections in their entirety.

Accordingly, as the Petitioner received a majority of the valid votes cast, we shall certify it as the exclusive collective-bargaining representative of the employees in the appropriate unit.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that International Union of Operating Engineers, Local 670, AFL-CIO, has been selected by a majority of the employees employed by the Employer in the appropriate unit, as their representative for the purposes of collective bargaining, and that pursuant to Section 9(a) of the Act, the said organization is the exclusive representative of all such employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Dated, Washington, D. C., May 11, 1965

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX E

Board's Order Denying
Motion for Reconsideration

WESTERN UNION
TELEGRAM

KA046DD247
D LLM258 GOVT PD=TDD PWS WASHINGTON DC 30 416P CST=CORRAL SPORTS WEAR CO, ATTN JOHN SIMPLER=

1022 WEST BROADWAY ST ARDMORE OKLA= RE: CORRAL SPORTSWEAR CO 16-RC-3745. IT IS HEREBY ORDERED THAT THE EMPLOYERS MOTION FOR RECONSIDERATION OF THE BOARDS DECISION AND CERTIFICATION OF REPRESENTATIVE BE AND IT HEREBY IS, DENIED AS IT PRESENTS NOTHING NOT PREVIOUSLY CONSIDERED. BY DIRECTION OF THE BOARD=

HOWARD W KLEEB ASSOC EXEC SECY=

APPENDIX F

Board's Decision and Order

156 NLRB No. 58 D-8549
Ardmore, Okla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 16-CA-2410

CORRAL SPORTSWEAR COMPANY

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 670, AFL-CIO

DECISION AND ORDER

Upon charges duly filed by International Union of Operating Engineers, Local 670, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 16, issued a complaint dated August 31, 1965, against Corral Sportswear Company, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint and notice of hearing before a Trial Examiner were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleges, in substance, that on or about May 11, 1965, the Union was duly certified by the Board[1] as the exclusive bargaining representative of Respondent's employees in the unit found appropriate by the Board and that, since on or about July 16, 1965, Respondent has refused to recognize or bargain with the Union as such exclusive bargaining representative, although the Union has requested it to do so.

On or about October 6, 1965, the parties executed a Stipulation whereby they agreed to the submission of this case directly to the Board on a stipulated record[2] for findings of fact, conclusions of law and a Decision and Order. The parties waived a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision. Respondent expressly reserved the right to contest on the basis of its previous contentions the validity of the findings of fact, conclusions of law, and certification in Case No. 16-RC-3745. The parties also reserved the right to contest the findings and conclusions and order to be made by the Board in the instant proceeding and to preserve their rights in respect thereto in the event of court review. Further, all parties expressly reserved

[1]Decision and Certification of Representative in Case No. 16-RC-3745 (not published in NLRB volumes). On June 30, 1965, the Board by telegraphic order denied Respondent's Petition for Reconsideration of this Decision and Certification of Representative.

[2]The record as stipulated to by the parties consists of the Stipulation and the following: the charge, the complaint and notice of hearing, the answer to the complaint and the entire proceedings in Case No. 16-RC-3745.

the right to file briefs.[3]

On October 11, 1965, the Board issued an Order approving Stipulation and Transferring Proceeding to the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the basis of the aforementioned stipulation, the brief and the entire record in this case, the Board makes the following:

FINDINGS OF FACT

I. *The business of Respondent.*

Respondent is, and has been at all times material herein, a corporation duly organized and existing by virtue of the laws of the State of Oklahoma with its office and place of business at Ardmore, Oklahoma, where it is engaged in the manufacture, sale and distribution of leather sportswear and related products. During the year preceding the execution of the stipulation Respondent in the course and conduct of its business operations received at its Ardmore, Oklahoma, plant goods valued in excess of $50,000 directly from states other than the state of Oklahoma.

Respondent admits, and we find, that Respondent is, and has been at all times material herein, an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[3]A brief has been received from the General Counsel.

II. *The Labor Organization Involved.*

The parties stipulated, and we find, that International Union of Operating Engineers, Local 670, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. *The Alleged Unfair Labor Practices.*

After the Union filed a petition in Case No. 16-RC-3745, the Union and Respondent entered into a Stipulation for Certification Upon Consent Election which was approved by the Regional Director for Region 16 on or about September 22, 1964. In that Stipulation both parties agreed that the following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed at the Respondent's Ardmore, Oklahoma, plant, excluding office clerical employees, truckdrivers, guards, watchmen and supervisors as defined in the Act.

On or about October 2, 1964, a secret ballot election was conducted pursuant to the aforesaid stipulation under the supervision of the Regional Director. The Tally of Ballots disclosed that of approximately 76 eligible voters, 36 voted for and 35 against the Union, and 5 ballots were challenged. The challenged ballots were, therefore, sufficient in number to affect the results of the election.

On or about November 27, the Regional Director

issued his Report on Challenged Ballots, in which he recommended that a hearing be held to resolve the challenges. The Board adopted the recommendation of the Regional Director and ordered a hearing, which was held on January 26, 1965. On February 17, 1965, the Hearing Officer issued his Report on Challenged Ballots in which he recommended that the challenges to all of the challenged ballots be sustained. Since it appeared on his recommended disposition of the challenged ballots that the Union had received a majority of the valid votes cast, the Hearing Officer further recommended that the Union be certified as the exclusive bargaining representative of the employees in the appropriate unit described above.

Thereafter, Respondent filed timely exceptions to the Hearing Officer's Report on Challenged Ballots. On May 11, 1965, the Board issued its Decision and Certification of Representative,[4] in which it overruled Respondent's exceptions to the Hearing Officer's Report, determined to be appropriate the aforementioned unit which was agreed upon by the parties, and certified the Union as the exclusive bargaining representative of the employees in that unit.

On June 18, 1965, Respondent filed a Petition for Reconsideration, requesting that the Board reconsider its Decision and Certification of Representative dated May 11, 1965, rescind the certification of the Union, set aside the results of the election conducted on October 2, 1964, and direct that another election be conducted. On June 30, 1965, the Board denied Respond-

[4]Not published in Board volumes.

ent's Petition for Reconsideration.[5]

On or about June 30 and July 14, 1965, the Union requested Respondent to bargain collectively with respect to rates of pay, hours of employment, and other terms and conditions of employment of the employees in the appropriate unit. Commencing on or about July 16, 1965, and at all times thereafter, Respondent refused, and continues to refuse, to bargain collectively with the Union. As the basis for its refusal to bargain Respondent has asserted in effect that the Board's Certification of the Union in Case No. 16-RC-3745 was erroneous on the grounds alleged by it in its Exceptions to the Hearing Officer's Report and in its Petition for Reconsideration.

In its answer to the complaint herein, Respondent contests only the Union's status as the exclusive bargaining representative of the employees in the appropriate unit. That issue, however, has already been decided by the Board in the representation case (No. 16-RC-3745). It is well settled that, absent special circumstances, not present here, the Board will not reexamine in an unfair labor practice proceeding a determination which it has made in a prior represen-

[5]Respondent's principal contention in support of its exceptions, which was repeated in its Petition for Reconsideration, was that the Board should reject, in addition to the 5 challenged ballots, the ballots of four other employees whom Respondent claimed to be supervisors. All of these additional four employees had voted without challenge in the election. By attacking the voting eligibility of these employees in its exceptions Respondent was in effect, seeking to make post-election challenges to their ballots. However, the Board's traditional policy, upheld by the Supreme Court, is not to entertain post-election challenges. *N.L.R.B. v. A. J. Tower Company*, 329 U.S. 324. Consistent with that policy, the Board in Case No. 16-RC-3745 found no merit in Respondent's contention.

tation case involving the same parties.[6]

Accordingly, we find that the Union was duly certified by the Board as the collective-bargaining representative of the employees of the Respondent in the appropriate unit described above and in the Board's certification, and that the Union at all times since May 11, 1965, has been and now is the exclusive bargaining representative of all the employees in the aforesaid unit, within the meaning of Section 9(a) of the Act. We further find that Respondent has, since July 16, 1965, refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meanin of Section 8(a)(5) and (1) of the Act.[7]

IV. *The Effect of the Unfair Labor Practices Upon Commerce.*

The acts of the Respondent set forth in Section III, above, occurring in connection with its operations as described in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The Remedy.*

Having found that the Respondent has engaged in

[6]E.g., *The Western and Southern Life Insurance Company*, 142 NLRB 28, 30 and cases cited therein.

[7]*Graphic Arts Finishing Co., Inc.*, 153 NLRB No. 115; *Salerno-Megowan Biscuit Company*, 152 NLRB No. 65.

unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

VI. *Conclusions of Law.*

1. Corral Sportswear Company is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 670, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed at the Respondent's Ardmore, Oklahoma, plant excluding office clerical employees, truckdrivers, guards, watchmen, and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining, within the meaning of Section 9(b) of the Act.

4. On May 11, 1965, and at all times thereafter, the above-named labor organization was and has been the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective-bargaining, within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 16, 1965, and at all times thereafter, to bargain collectively with the

above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Responedent has interfered with, restrained and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Corral Sportswear Company, Ardmore, Oklahoma, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with International Union of Operating Engineers, Local 670, AFL-CIO, as the exclusive and duly certified bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees em-

ployed at Respondent's Ardmore, Oklahoma, plant, excluding office clerical employees, truckdrivers, guards, watchmen and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Ardmore, Oklahoma, plant, copies of the attached notice marked "Appendix."[8] Copies of said notice, to be furnished by the Regional Director for Region 16, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[8]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order," the words "a Decree of the United States Court of Appeals, Enforcing an Order."

(c) Notify said Regional Director for Region 16, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. December 29, 1965

.....

Frank W. McCulloch, Chairman

.....

John H. Fanning, Member

.....

Howard Jenkins, Jr., Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with International Union of Operating Engineers Local 670, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All our production and maintenance employees employed at our Ardmore, Oklahoma, plant excluding office clerical employees, truckdrivers, guards, watchmen and supervisors as defined in

the Act.

CORRAL SPORTSWEAR COMPANY

(Employer)

Dated, ...

By, ...

(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6th Floor Meacham Building, 110 West Fifth St., Fort Worth, Texas, 76102 (Tel. No. BAltimore 1-7000), if they have any questions concerning this notice or compliance with its provisions.

APPENDIX G

Pertinent Statutory Provisions

The relevant provisions of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U.S.C., 141 et seq.) are as follows:

"TITLE I-AMENDMENT OF NATIONAL LABOR RELATIONS ACT

"Sec. 101. The National Labor Relations Act is hereby amended to read as follows:" * * * *

"DEFINITIONS

"Sec. 2. When used in this Act—" * * * *

"(3) *The term 'employee'* shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but *shall not include* any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or *any individual employed as a supervisor*, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined." (Emphasis Added) * * * *

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." * * *

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—" * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." * * * *

"REPRESENTATIVES AND ELECTIONS

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:" * * * *

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript." * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"Sec. 10.(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." * * * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor

practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency." * * * *

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act:" * * * *

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file

in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

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No. 109.

In the Supreme Court of the United States

OCTOBER TERM, 1967

CORRAL SPORTSWEAR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
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General Counsel,
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Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1094

CORRAL SPORTSWEAR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A–1—A–9) is reported at 383 F. 2d 961. The Board's Decision and Order in the unfair labor practice proceeding (Pet A–17—A–29) are reported at 156 NLRB 436. The underlying representation decision is set forth at Pet. A–13—A–16.

JURISDICTION

The court of appeals entered its judgment on October 4, 1967 (Pet. A–1—A–11). A timely petition for rehearing was denied on November 15, 1967 (Pet.

292-950—68

A–12). The petition for a writ of certiorari was filed on February 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly declined to entertain the employer's post-election challenges to the ballots of four employees who were permitted to vote without challenge in a Board representation election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth in Appendix G to the petition (pp. A–30—A–34).

STATEMENT

In August 1964, Local 670, International Union of Operating Engineers, AFL–CIO, petitioned the Board for a representation election among the production and maintenance employees of the Corral Sportswear Company. The Union and the Company subsequently stipulated, with Board approval, to the holding of a representation election within the unit requested (Pet. A–20). The Company thereupon submitted a list of its employees, from which the parties excluded individuals they agreed were supervisors, leaving an eligibility list of 76 employees, including 6 employees designated as "linegirls" [1] (R. 392; 374–377).

[1] Linegirls worked with the seamstresses in petitioner's garment plant, but did no actual sewing themselves. They were responsible for effectuating an efficient flow of cut cloth through the four lines of seamstresses (R. 391; 27–29, 228–229, 374–377). They inspected and corrected the work as it moved along the

The Union won the election, 36 to 35 (Pet. A–20). At the election, however, the Union challenged the ballots of four employees, including two of the linegirls, Roberts and Heartsill, who it contended were supervisors, and the Company challenged the ballot of Pat Wilson, a set-up department employee, on the ground that she, too, was a supervisor. At that time, the Company did not challenge the eligibility of the other four linegirls (Pet. A–6–A–7). Since the challenges were sufficient to affect the outcome of the election, the Board ordered a hearing on the challenges (R. 385–388).[2]

The hearing officer found that the two linegirls, Roberts and Heartsill, had sufficient authority to make them supervisors (Pet. A–31), and sustained the Union's challenges to their ballots (Pet. A–21; R. 397–400). He also sustained the Union's challenge to the two other ballots and the Company's challenge to the ballot of Pat Wilson (R. 400–402). The Company filed exceptions with the Board contending, *inter alia*, that Roberts and Heartsill were not supervisors, but that, if they were, then the ballots of the other four linegirls should also be invalidated (R. 413, 414). The Board overruled the Company's exceptions, sustained the hearing officer's findings, and certified the Union (Pet. A–15, A–21).

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line, and were generally responsible for ascertaining that each seamstress remained busy and that production was maintained (R. 397; 26–30, 57–61, 109, 172, 255–259, 325–326, 338–340, 363–364).

[2] "R." refers to the joint appendix filed in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Following the certification of the Union, the Company refused to bargain, and the Board's General Counsel issued an unfair labor practice complaint. The Company defended its refusal to bargain solely on the ground that the Union had been improperly certified, urging in particular that the Board had erred in not setting aside the election because the four linegirls had voted (Pet. A–22). The Board, noting that the four linegirls had not been challenged, held that the Company's contention was foreclosed under the Board's traditional policy, approved in *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, of not entertaining post-election challenges to voter eligibility (Pet. A–22, n. 5). Accordingly, the Board concluded that the Union had been properly certified, and that the Company had violated Section 8(a) (5) and (1) of the Act in refusing to bargain (Pet. A–23). The Board ordered the Company to bargain with the Union upon request, and to post the usual notices (Pet. A–25—A–29). The court of appeals enforced the Board's order in full (Pet. A–1—A–9).

ARGUMENT

The decision of the court of appeals involves a proper application of the principles approved by this Court in *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, to the special facts of this case. In *Tower*, this Court held that the Board's procedural rule prohibiting post-election challenges to ballots was "in accord with the principles which Congress indicated should be used in securing the fair and free

choice of collective bargaining representatives." 329 U.S. at 332. The Court noted that such a rule was particularly appropriate in Board representation cases, since post-election challenges would tend to encourage "undue attacks on the eligibility of voters so as to delay the finality and statutory effect of the election results," invade the secrecy of the ballot, encourage deceit and trickery in the preparation of voting eligibility lists, and extend the atmosphere of animosity and strife often accompanying such elections beyond the closing of the polls. *Id.* at 331–332. The Court concluded that, although "cutting off the right to challenge" after the election "conceivably may result in the counting of some ineligible votes," this disadvantage was "far outweighed by the dangers attendant upon the allowance of [such] challenges." *Id.* at 331.

The Board's application of its rule barring post-election challenges in the instant case is entirely consistent with the principles enunciated in *Tower,* and creates no inequity. The Company, although well aware of the duties of the linegirls, considered them to be "employees" on the eligibility list which it furnished the Board, and, at the election, did not raise any question as to these four linegirls, even after the Union had specifically raised an issue with respect to the other two linegirls. Moreover, the Company's default in failing to challenge the four linegirls was not without significant consequences. Had the Company challenged those four people at the time of the election, their ballots could have been impounded so that

it could later have been determined whether or not their votes affected the election. By failing to challenge the four linegirls, petitioner allowed their votes to be commingled with those of the other qualified employees so that it is impossible to tell, without resort to extraneous evidence, whether they voted for or against the Union.

Contrary to petitioner's assertion (Pet. 8–9), the court below did not hold that the Federal Rules of Civil Procedure were controlling in Board representation proceedings. It merely drew on those rules by analogy, in noting that the Company, at the election, could have advanced "inconsistent positions as alternatives dependent upon a fact finding" (Pet. A–9, n. 8); *i.e.*, the Company could have argued that all of the linegirls were "employees," but, should the Board find that they were in fact supervisors, their ballots should not be counted. Indeed, the Company did make such an alternative argument at the post-election stage in its exceptions to the Board from the hearing officer's Report on Challenged Ballots (R. 413).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

MARCH 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968